FILED
JUN 13 1983
Alexander L. Stevas, Clerk

No. 82-6935

RECEIVED
JUN 15 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PATRICK PAYNE, SR.,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

Alan Shachter
Counsel for Petitioner
10561 Crestwood Drive
Manassas, Virginia 22110
(703) 369-1001

Paul F. Gluchowski
Co-Counsel for Petitioner
9263 Church Street
Manassas, Virginia 22110
(703) 361-1110

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner's conviction of willful, deliberate and premeditated killing in the commission of robbery while armed with a deadly weapon, barred his subsequent prosecution for the lesser offense of robbery.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

JOSEPH PATRICK PAYNE, SR.,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

The petitioner, Joseph Patrick Payne, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered on April 14, 1983.

OPINION BELOW

The Supreme Court of Virginia entered its Order refusing petitioner's petition for appeal on April 14, 1983. A copy of the Order is attached as Appendix A.

JURISDICTION

On April 14, 1983, the Supreme Court of Virginia entered judgment refusing petitioner's petition for appeal. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ***Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, ***

STATEMENT OF THE CASE

Joseph Fatrick Payne, Sr. was charged in separate indictments with having committed capital murder in violation of § 18.2-31(d) of the 1950 Code of Virginia, as amended, and robbery, in violation of § 18.2-58 of the 1950 Code of Virginia, as amended.

He was convicted by a jury of capital murder on November 25, 1981. A motion to dismiss the robbery indictment upon a written plea of former jeopardy was argued and denied by the Prince William County, Virginia, Circuit Court on December 1, 1981. (A copy of the transcript of the motion and ruling is attached as Appendix B). On December 2, 1981, the petitioner was convicted of robbery by the trial judge.

On February 12, 1982, judgment on the above two convictions was entered and the petitioner was sentenced to consecutive life sentences in the state penitentiary.

Petitioner filed a timely Notice of Appeal to the Supreme Court of Virginia. Among the stated assignments of error was whether or not the trial Court had erred in denying his Motion of Dismiss the robbery indictment on the ground of former jeopardy. The Petition for Appeal was refused by the Supreme Court of Virginia. (Appendix A).

REASON FOR GRANTING THE WRIT

The Constitution of the United States and the Constitution of Virginia, prohibit a person from twice being put in joepardy for the same offense. U.S. Constitution Amend. V; Va. Constitution Art. 1 Sec. 8.

The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction. North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed. 2nd 656, 89 S.Ct. 2072 (1969).

Where a lesser offense requires no proof beyond that which is required of the greater offense, this Court has held that "The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included within it." Brown v. Ohio, 432 U.S. 161, 167, 53 L. Ed. 2nd 187, 97 S.Ct. 2221 (1977) applying the rule enunciated in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 2nd

306, 52 S.Ct. 180 (1932); Harris v. Oklahoma, 433 U.S. 682, 53 L. Ed. 2nd 1054, 97 S.Ct. 2912 (1977); Whalen v. United States, 445 U.S. 684, 63 L. Ed. 2nd 713, 100 S.Ct. 1432 (1980).

In Harris, the accused and a companion robbed a grocery store clerk and the companion killed the clerk. The defendant was convicted of felony murder in connection with the death and subsequently convicted of armed robery. The applicable Oklahoma statute, 21 O.S. Supp. 1973, § 701.1 to 701.6, provided in pertinent part as follows:

> SECTION 1. Murder in the first degree homocide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:
>
> "***
>
> SECTION 2. When perpetrated by one committing or attempting to commit rape, _ _ _ _, armed robbery, or _ _ _ _

In reversing the defendant's conviction for robbery, this Court reasoned (id. at 683).

> When, as here, conviction for the greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one.
>
> (emphasis added).

In substance, the Virginia capital murder statute is identical to the felony murder statute of Oklahoma. The 1950 Code of Virginia, as amended, provides that:

> SECTION 18.2-31 CAPITAL MURDER DEFINED: PUNISHMENT. The following offenses shall constitute capital murder, punishable as a Class 1 Felony:_ _ _ _ _
>
> (d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon.

Both the Oklahoma and the Virginia statutes create offenses which include within them the lesser offense of robbery as a required element of proof. It is clear that petitioner could not have been convicted of capital murder, in the form prescribed in the indictment against him,

without the requisite proof that the murder occurred during the commission of robbery. This position is buttressed by examination of the trial Court's instructions which obligated the jury to return a verdict of not guilty to capital murder unless it found that the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon. The jury was informed of the requisite elements required in order to prove robbery.

The trial Court, in denying petitioner's motion to dismiss the robbery indictment on grounds of double jeopardy, opined that the Virginia legislature clearly intended that a perpetrator of murder during the commission of armed robbery subjected himself to punishment for both the greater offense of capital murder and the lesser offense of robbery. Subsequently this opinion was enunciated by the Virginia Supreme Court in Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E. 2nd 798, (1982).

In Fitzgerald, however, the defendant was convicted, in a single trial, of capital murder in the commission of armed robbery and during the commission of, or subsequent to, rape (§ 18.2-31(e) of the 1950 Code of Virginia, as amended). As the Virginia Supreme Court pointed out, that case involved protection against multiple punishments only, and was controlled by Whalen, supra.. Because the defendant was convicted of the greater and lesser included offenses, in a single trial, the Supreme Court of Virginia opined that Harris, supra., was inapposite, Id. at 634, 809.

Here, however, petitioner was convicted of capital murder during the commission of armed robbery and in a subsequent separate trial he was prosecuted and convicted on a separate indictment charging the lesser offense of robbery. In denying the petitioner's petition for appeal and finding no reversible error, the Supreme Court of Virginia has determined that he could be prosecuted twice for the same offense despite this Court's decision in Harris. Petitioner's conviction for robbery is in conflict with the decisions of this Court. Review by this Court is required to provide consistency in this important area of the law.

CONCLUSION

For the foregoing reasons, petitioner, Joseph Patrick Payne, Sr., respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia. The Court may wish to consider summary reversal in view of this Court's prior decision in Harris, supra..

RESPECTFULLY SUBMITTED,

PAUL F. OLUCHOWSKI
9263 Church Street
Manassas, Virginia 22110
Telephone (703) 361-1110

ALAN SHACHTER
10561 Crestwood Drive
Manassas, Virginia 22110
Telephone (703) 369-1001

Attorneys for Petitioner, Joseph Patrick Payne, Sr.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 14th *day of* April, 1983.

Joseph Patrick Payne, Sr., Appellant,

against Record No. 820848
Circuit Court Nos. C-10431
and C-10447

Commonwealth of Virginia, Appellee.

From the Circuit Court of Prince William County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgments complained of. Accordingly, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the total fee set forth below and also their necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorneys' fee	$350.00	plus their costs and expenses
Filing fee	25.00	

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

APPENDIX A

V I R G I N I A

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

- - - - - - - - - - - - - - - - x

COMMONWEALTH OF VIRGINIA, :

vs. : Criminal Docket No. 10431

JOSEPH P. PAYNE, SR., :

Defendant. :

- - - - - - - - - - - - - - - - x Tuesday, December 1, 1981

Circuit Courtroom No. 2
Prince William County
Courthouse
Manassas, Virginia

The above-entitled matter came on for hearing before THE HONORABLE PERCY THORNTON, JR., Judge, in and for the Circuit Court of Prince William County, Virginia, at 9:10 o'clock a.m.

APPEARANCES:

On behalf of the Commonwealth:

PAUL FREDE, ESQUIRE

On behalf of the Defendant:

PAUL GLUCHOWSKI, ESQUIRE
ALAN SHACKTER, ESQUIRE

Mar 22, 82
Deputy Clerk

P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by the Clerk of the Court.)

THE COURT: We have the case of Commonwealth of. Virginia vs. Joseph Patrick Payne, Sr., Criminal Number 10431. Comes on the Defense plea of double jeopardy and motion to dismiss the indictment for armed robbery charged in this indictment.

Do you have other argument you want to make or your motion?

MR. [illegible]: Your Honor, we have, of course, submitted our brief containing the authority which we intend to rely on.

In addition to that, I have supplied Commonwealth Attorney -- and I would like now to submit for the Court's attention -- a copy of the Oklahoma statute on which we believe the controlling case, in point the Harris v. Oklahoma case, dealt; together with a very recent opinion by Judge Robertson in Fauquier County.

Your Honor, that last decision in Fauquier County [illegible] a situation in which the Defendant was tried in another county for the underlying felony of robbery and then attempted to be tried in Fauquier for capital murder.

MILLER & GREEN REPORTING SERVICE
CERTIFIED LEGISLATIVE REPORTERS
3459 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
(703) 591-3130

Judge Robertson in his memorandum opinion reviewed the cases which deal with this issue and ruled that because there was a conviction of the underlying felony, that there could not be a conviction of capital murder based on that underlying felony, although he did indicate that the Commonwealth could proceed on the basis of first degree murder premeditated.

It is the reverse, granted, of the argument that we are making today, but I think it strengthens the Defendant's position in that the Defendant, of course, has already been convicted of the highest offense. That offense that the Commonwealth elected to proceed on included as an essential element robbery while armed with a firearm.

I would direct the Court's attention to two of the Commonwealth's instructions which were granted in that case; one, which defined the crime itself of capital murder and what the Commonwealth had to prove in order to obtain a conviction. That is, that the Defendant killed Mrs. Winslow, that the killing was willful, deliberate and premeditated, and that the killing occurred during the commission of robbery while the Defendant was armed with a deadly weapon.

In addition to that, the Commonwealth offered

and was granted on instruction number 14 which defined clearly all the elements of robbery which the Commonwealth had to prove in order to obtain that very conviction.

Now, Your Honor, I've had a brief opportunity to look at the Commonwealth's memorandum in support of their opposition to our motion, and I'd like to speak briefly on two points.

The Jones case is readily distinguishable from the case at bar. We concede that the Defendant may be convicted of the use of a firearm during the commission of a felony. The reason we concede that is because the Supreme Court of Virginia has indicated that even though a firearm was used during the commission of a felony, that is not necessarily what caused the death. So, therefore, they are two distinct and separate offenses. Now, the robbery on the other hand is an integral part of the capital murder offense.

The Supreme Court of Virginia, contrary to what the Commonwealth has indicated in her memorandum, has spoken on that issue in the Harrison case by dictum. They indicate on Page 123 of their opinion that in the --

THE COURT: I have it here.

MR. GUIDUGLI: Yes, sir. -- in the circumstances

[illegible] & GREEN REPORTING SERVICE
CERTIFIED SHORTHAND REPORTERS
10516 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
[illegible] 2038

we do not believe there exists in this case double jeopardy problem the Supreme Court dealt with in Harris v. Oklahoma. The reason it did not exist there is because the Supreme Court found that there was sufficient evidence from which the judge in the lower court could have convicted the defendant of premeditated murder.

THE COURT: Let me ask you. Wouldn't that in fact, though, be an incongruity? As I understand the Harrison case, a person could be convicted not only of the robbery and first degree murder or felony murder. They rule in this case apparently that it was first degree murder.

MR. GIUCHOWSKI: No, I don't believe that there could be, Your Honor, because the Court takes pains to point out the fact that since there was sufficient evidence to convict him of premeditated murder, they didn't have to deal with the fact that there might have been an underlying felony murder.

I think the result would have been contrary if the only evidence in that case was -- in other words, if there was no evidence of premeditation. If there was no evidence of premeditation, but the murder occurred during the commission of a felony, I think the Court would have

been bound and by their dicta, they are telling us that they would have been bound by the Harris case. So, I don't believe that there is any incongruity there.

I think they essentially evaded the issue that we are dealing with today because they decided that although the Judge's opinion was unclear, the evidence could have supported a conviction either for premeditated or murder during the commission of armed robbery in which no premeditation was required.

In capital murder, premeditation is required together with the underlying felony. Everything is required. The Commonwealth proceeded and elected to proceed on a basis of capital murder. The type murder that if he is convicted of would carry with it the maximum punishment, the ultimate punishment, as I have spoken to you before, of death.

Naturally, we have to assume because of the law that was given to the jury that they found the Defendant killed Mrs. Winslow during the commission of robbery based on the instructions and based on the indictment.

In Harris v. Oklahoma, Your Honor, the Supreme Court has dealt with this precise issue. They indicate -- and that was a felony murder situation -- that because

ROBERTA GREEN REPORTING SERVICE
OFFICIAL COURT REPORTERS
[illegible] BRIDGE ROAD
[illegible] VIRGINIA 2203
(703) 591-3136

he was convicted of the felony murder, the underlying felony was included in that conviction; and for the purposes of double jeopardy, was therefore the same offense using the Blockburger test.

THE COURT: All right, sir. Do you have argument you want to make on your position, Mr. Ebert?

MR. EBERT: Yes, Your Honor. To start with without getting into -- To try to distinguish this case in counsel's argument, I really think -- I'm convinced that the Court of Appeals has not addressed this issue, and I'm informed that it is now pending before the Court of Appeals in Virginia.

In the Harris case, that is a pre-case to the Whalen v. United States, which I think -- at least the Attorney General thinks -- is a marked change in the law. That is a pre-Whalen. As a matter of fact, the Barbee case, a case which was specifically held up pending that decision by the United States Supreme Court in Whalen.

If you look at the Simpson case which is found -- 267 SE 2nd, Page 134 -- they say that the rationale in the Harris case is that they take the intent as a fiction. They say that the intent in robbery, the fact you commit a robbery, supplies the intent for murder. In other words,

RUSH & GREEN REPORTING SERVICE
[illegible]
[illegible]
FAIRFAX, VIRGINIA 22030
(703) 591-3134

you may not intend to kill somebody in felony murder, but if you commit a robbery and in the course of that robbery you kill someboy, you are guilty of first degree murder because you are presumed to intend the murder in the course of that robbery. That is a fiction. But in felony murder, you have to go a little further.

You cannot transfer that intent because in addition to the felony, you have to show a premeditation. I say felony murder -- capital murder. You have to show premeditation. So, there is a different element and you are not allowed to transfer any intent from the robbery, so you have, in effect, two separate distinct acts on that basis.

But more importantly, I think, after Whalen -- and the Whalen case I have here if the Court would like to look at it -- the Supreme Court talks about Blockburger, and I think they change the entire approach to double jeopardy. What we are really talking about here is double punishment. Does it in fact or is the Court entitled under the double jeopardy clause to impose double jeopardy if, in fact, two separate distinct statutes are violated.

Now, in the Whalen case the Court decided that if the D. C. law which was under question there in that

case that it was the intent of Congress -- Congress was the one that formulated the D. C. prosecution. It was their intent to apply the Blockburger test. They say at Page 724 and the general principle in what we want to decide is whether or not consecutive sentences may be imposed depends on the intent of Congress. They go back through the legislative history of the two statutes in question and determine that the intent of Congress was to allow the Blockburger standard to exist.

So, what this Court has to determine is what was the intent of the Virginia Legislature. I don't think the Virginia Legislature ever intended for someone who is guilty of capital murder to be in a position to be barred from a prosecution where they would not be barred from a prosecution in the case of a felony murder.

I think they are separate and distinct offenses. As a matter of fact, this was an attempt to categorize certain acts; that is premeditated murder in the course of a robbery which elevates it out of the felony murder category to make that an additional punishment.

If we look at the case of Commonwealth vs. Turner which is found --

MAY COUPE. I have it here.

MR. FUPPT: They say on Page 47, "The constitutional guarantee against multiple punishments is limited to assuring that the Court does not exceed its legislative authorization by imposing multiple punishments for the same offense." They say, "Where two or punishments for separate statutory violations are imposed at a single criminal proceeding, the question of what punishments are constitutionally permissible is not different from the question of what punishments the legislative branch intended to impose." They cite Whalen vs. United States which was decided in 1980.

They say in that case -- they go on to say that "the General Assembly has clearly intended its intent to impose multiple punishments for capital murder and the use of a firearm." I think the same thing applies in their intent to apply additional punishment or multiple punishments not only for robbery but for capital murder.

In the case which was decided by Judge Marriage, that is Barbee vs. Mitchell --No. 816690 -- that case is on appeal in the 4th District at this time. The 4th District has not decided that case. But Judge Marriage in his opinion says "After Whalen vs. United States, the sole question presented is whether or not Virginia's

BRIDGER & GREEN REPORTING SERVICE
[illegible]

Legislature has authorized imposition of cumulative punishment for felony murder and the underlying felony. Although the Virginia Supreme Court has never squarely addressed this issue in a post-Whalen context, the Court concludes that under Virginia law such cumulative punishments are authorized."

Now, I think that Judge Marriage he has to more or less guess what the intent of the Virginia Legislature is. I think that's pretty much what this Court has got to do.

There are a number of cases in this Commonwealth and Judge Marriage pointed to that in his opinion where there have been convictions of both the underlying felony and felony murder. You've got Stamper vs. Commonwealth -- these are all cited -- Briley vs. Commonwealth, Ciarratano vs. Commonwealth, and Coppola vs. Commonwealth. I attached a copy -- I didn't have an extra copy, so I didn't give it to counsel -- of the conviction orders in Coppola showing that the Circuit Court of Newport News did, in fact -- There is no Memorandum of Opinion, but it does show the conviction not only for robbery, but a conviction for felony murder in addition.

Now, the only time I think the Court has ever

really looked at the issue, they have never looked at the issue directly, but as close as they come is in the use of a firearm as well as a felony; and if you look at the rationale in Turner, they go back to legislative intent. I think it is clear from the law that it definitely violates the two different sections, and I think it's clear that the intent of the Virginia Legislature was to allow multiple punishments for violation of these two separate and distinct crimes.

MR. GLUCHOWSKI: Your Honor, may I briefly respond, please.

THE COURT: Go ahead.

MR. GLUCHOWSKI: In the Brown case which I cited in our brief, it was clearly the intent of the legislature to allow multiple punishments for two different types of offenses. When it got to the Supreme Court, the Supreme Court applying the Blockburger test, which Whalen emphasizes is the controlling test, said that very well may be. That very well be what the legislative intent was; however, for the purposes of double jeopardy if one is a lesser included offense of the other and if there is a conviction of that, then the prosecution for the higher offense or lower offense is necessarily barred. So, it has

RUDIGER & GREEN REPORTING SERVICE
CERTIFIED SHORTHAND REPORTERS
3819 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
(703) 591-3136

been addressed. It has been addressed in Brown, it has been addressed in Blockburger, and most recently on a case on all fours in Harris vs. Oklahoma.

THE COURT: All right, sir. Do you have any other argument you want to make in the matter?

MR. EBERT: The only thing I can say, Your Honor, I don't believe that the Blockburger test was referred to in Whalen as being the controlling test. The only thing they said was that there was an intent of Congress at the time they adopted the D. C. statute to allow the Blockburger test to apply.

They don't say anything about the intent of Virginia General Assembly and as in the other cases which have decided this issue -- the other states -- and I have put those in my brief, too. Some seven or eight states have decided that the intent of their legislature was to allow multiple punishments under the circumstances.

THE COURT: Well, the plea in bar, the motion to dismiss the indictment for armed robbery being the same is hereby denied.

I have no problem saying that the legislature clearly intended two distinct crimes in the matter of armed robbery and also the matter of capital murder in the

RUDIGER & GREEN REPORTING SERVICE
CERTIFIED GRATIS REPORTERS
3852 [illegible] BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
(703) 591-3136

commission of robbery. You have with that, of course, the willful, deliberate, premeditated intent. That would be the ruling of the Court.

Also, it would place this Court in a rather precarious position in knowing that the accomplice, the brother of the Defendant in this case, has been convicted of felony murder and likewise convicted of the same robbery.

So, in view of thereof, I have to deny it. Let the Supreme Court make the decision on this one.

MR. GLUCHOWSKI: Your Honor, please note our exception.

Your Honor, there is a couple of other matters that if the Court's got time, we did not notice the Commonwealth of these, but under the circumstances, we would at this time renew all of our motions that we have previously filed in the capital murder case; those being motions to suppress any statements that the Defendant made and, also, to change the venue for his robbery trial. Now, circumstances have changed somewhat in that inasmuch as the Defendant has already been convicted of capital murder and that has necessarily hit the headlines, we feel that there is that much more argument that the case should

RUDDER & GREEN REPORTING SERVICE
CERTIFIED VERBATIM REPORTERS
[illegible]
[illegible]
(703) [illegible]

RECEIVED
JUN 16 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH PATRICK PAYNE, SR.,

82-6935 Petitioner

v.

COMMONWEALTH OF VIRGINIA

Supreme Court, U.S.
FILED
JUN 13 1983
Alexander L. Stevas, Clerk

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Joseph Patrick Payne, Sr., asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the Circuit Court of Prince William County, Virginia and the Virginia Supreme Court. Petitioner's affidavit in support of this motion is attached hereto.

Joseph P. Payne Sr.
JOSEPH PATRICK PAYNE, SR.

A F F I D A V I T

I, Joseph Patrick Payne, Sr., being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

   No - January, 1981 - $1,032.00 Gross

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Joseph Patrick Payne, Jr., - Son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Joseph P. Payne Sr.
JOSEPH PATRICK PAYNE, SR.

Subscribed and sworn to before me this 8 day of June, 1983, by Joseph Patrick Payne, Sr..

Charles H. DeLaney
NOTARY PUBLIC

My Commission expires: July 19, 1986.

No. 82-6935

JUL 29 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUL 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PATRICK PAYNE, SR.,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

Paul B. Ebert
Counsel of Record
Attorney for the Commonwealth
Prince William County
9304 Peabody Street
Manassas, Virginia 22110
703/369-9270

William M. Ryland
Co-Counsel of Record
Assistant Commonwealth Attorney
Prince William County
9304 Peabody Street
Manassas, Virginia 22110
703/369-9271

10

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner's conviction of willful, deliberate and premeditated killing in the commission of robbery while armed with a deadly weapon, barred his subsequent prosecution for robbery.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-6935

JOSEPH PATRICK PAYNE, SR.,

PETITIONER,

V.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The respondent, the Commonwealth of Virginia, respectfully prays that petitioner's request that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia, entered on April 14, 1983, be denied.

The respondent concurs in the representations of the petitioner's petition concerning the Opinion Below, Jurisdiction, Constitutional Provision Involved and Statement of the Case, as provided in Rules 22.1 and 34.2 of this Court.

ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI

Your petitioner has raised this appeal to this Honorable Court on the allegations that he has been placed in jeopardy twice for the same offense, in violation of the Fifth Amendment to the United States Constitution. The constitutional guarantee against double jeopardy affords protection in three circumstances: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.

North Carolina v. Pearce, 395 US 711, 717, 23 LEd 2d 656,89 SCt 2072 (1969). Only the second of these protections is applicable to this appeal and your respondent therewith submits that this Court has established a clear definition of the law on this aspect of double jeopardy.

The established test for determining whether two offenses are distinctly separate or are the same offense (or one offense is a lesser-included offense of the greater offense) was stated in Blockburger v. United States, 284 US 299, 304, 76 LEd 2d 306, 52 SCt 180 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not ...

cited in Brown, supra, 432 US at 166, 53 LEd 2d at 194. In applying this test, this Court has ruled that the two offenses must be viewed in the abstract rather than with reference to the particular facts of the case. Whalen v. United States, 445 US 684, 694 n.8,63 LEd 2d 715, 725 n.8, 100 SCt 1432 (1980). The Supreme Court of Virginia has incorporated this abstract analysis approach to the Blockburger test in Blythe v. Commonwealth, 222 Va 722, 284 SE 2d 796, 798 (1981). Viewing the capital murder statute of the Code of Virginia in the abstract, there are seven distinct alternatives to establishing capital murder, one of which is "the willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon." Section 18.2-31, 1950 Code of Virginia, as amended. Under this analysis, there is no requirement that the murder charge be proven specifically by robbery with a deadly weapon; there are six other abstract possibilities within the same statutory offense. Similarly, the robbery charge does not require proof of the victim's death. Thus, we have two offenses, each of which requires proof of an element of an offense which the other does not, regardless of the facts of the case.

The abstract analysis approach of Whalen and Blythe is cited in at least two recent opinions of the Fourth Circuit of the United States Court of Appeals. In United States v. Lurz, et.al., 666 F 2d 69, 74 (4th Cir. 1981), the Fourth Circuit ruled by abstract analysis that two federal drug trafficking statutes were not the same offense:

> We are satisfied that the determination that there were two independent conspiracies was not clearly erroneous. Preparation and distribution could, of course, be part of a single integrated operation. Viewed as an abstraction, it is no less likely, however, that a principal in the operation, here Lurz, could limit the distribution ring participants to disposition of PCP, while making other arrangements with other persons independent of the distributors for acquisition of PCP...(Emphasis in original). Id. at 74, cert. denied, 455 US 1005.

More recently, the Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia in an unpublished opinion, Barbee v. Mitchell, No. 81-6690 (4th Cir. 1982) in which the Blythe approach to the abstract analysis of the Blockburger test was wholly adopted.

Respondent would also argue that the abstract analysis of the statutes of the Code of Virginia by the Supreme Court of Virginia is incumbent upon this Court. A state's highest court has "the final authority to interpret...that state's legislation." Brown v. Ohio, 432 US at 167, 53 LEd 2d at 195; Garner v. Louisiana, 368 US 157, 169, 7 LEd 2d 207, 82 SCt 248 (1961). Additionally, where one offense is created by statute and the other is created by codifying a common law definition, the Blockburger test is inapposite. The initial inquiry of the Blockburger test requires a comparison of two statutory offenses. While capital murder, Section 18.2-31, is an offense created by statute alone, robbery has been ruled by the Supreme Court of Virginia as a common-law offense whose definition has simply been codified into the statute of the Commonwealth. Blythe, supra, 284 SE 2d at 797; Whitley v. Commonwealth, 223 Va. 66, 73 (1983); Jones v. Commonwealth, 218 Va. 18, 21 (1977); Jones v. Commonwealth, 172 Va. 615, 618 (1939).

Without surmounting this threshold issue of the Blockburger test, it is clear that capital murder and robbery are two distinct offenses in Virginia for double jeopardy purposes and do not require the Blockburger test to arrive at that conclusion. Both within and without the Blockburger test, the Virginia Supreme Court has ruled as to the substantive interpretation of its own statutes and those opinions are binding on this Court.

Apart from the Blockburger test, this Court has opined as to the point of departure with which successive prosecutions should be regarded:

> Unless it is plain that two offenses are "the same" for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option ... [The defendant] ... was simply under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue.
>
> Jeffers v. United States, 432 US 137, 150 n.15, 53 LEd 2d 168, 179 n.15, 97 SCt 2207, reh'g denied, 434 U.S. 880, 54 LEd 2d 164 (1977).

Here, it is obvious that the burden is on the defendant to raise any double jeopardy issues; absent any objections, successive prosecutions are not barred and a claim of double jeopardy does not validly lie. According to the decisions presented here, it is not plain that capital murder and robbery are "the same" for double jeopardy purposes and thus the trial court below and the Supreme Court of Virginia did not err in permitting the prosecution of the robbery charge subsequent to the capital murder conviction.

Petitioner's argument places reliance upon Harris v. Oklahoma, 433 US 682, 53 LEd 2d 1054, 97 SCt 2912 (1977). However, due to the abstract analysis of the Blockburger test required by the foregoing case decisions, it cannot be said that robbery is the same as, or a lesser-included offense of, capital murder as argued in petitioner's petition at page 3. Thus, Harris does not achieve the status of controlling authority and reliance thereon is misplaced; the successive prosecution for robbery

is not barred. In accord with argument above, the Supreme Court of Virginia, the Fourth Circuit Court of Appeals and this Honorable Court have uniformly ruled that abstract analysis is a required element of determining whether two offenses are the same or one is a lesser and included offense of the other. These decisions consistently argue that the double jeopardy protections of the Fifth Amendment have not been violated here.

WHEREFORE, the Commonwealth of Virginia respectfully prays that petitioner's petition for writ of certiorari not be reviewed, as the decision below is consistent with considered opinions of this Honorable Court.

Respectfully submitted,
Commonwealth of Virginia

Paul B. Ebert
9304 Peabody Street
Manassas, Virginia 22110
703/369-9270

By: William M. Ryland
William M. Ryland
9304 Peabody Street
Manassas, Virginia 22110
703/369-9271

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-6935

RECEIVED
JUL 29 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH PATRICK PAYNE, SR.,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PROOF OF SERVICE

STATE OF VIRGINIA

COUNTY OF PRINCE WILLIAM, to-wit:

William M. Ryland, after being duly sworn, deposes and says that pursuant to Rule 28 of this Court he served the within Brief in Opposition to Writ of Certiorari to the Supreme Court of Virginia on counsel for the Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Alan Shacter
Counsel for Petitioner
10561 Crestwood Drive
Manassas, Virginia 22110

Paul F. Gluchowski
Counsel for Petitioner
9263 Church Street
Manassas, Virginia 22110

and depositing same in the United States mails at Manassas, Virginia on July 29, 1983.

William M. Ryland

William M. Ryland, AFFIANT

Subscribed and sworn to before me this 29th day of July, 1983.

Donna Oliver

Notary Public in and for the said County and State

My Commission Expires 1/17/87